



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 12, 1996

Mr. Richard Ybarra
Assistant Attorney General
General Litigation Division
Office of the Attorney General
P.O. Box 12548, MC-018
Austin, Texas 78711-2548

OR96-0323

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37222.

The Office of the Attorney General (the "OAG") received an open records request for "all records filed in your agency for Barbara Doyle, a nursing home administrator at the Heritage Manor Care Center in Hondo whose liscence [sic] was revoked in 1992." You have submitted to this office as responsive to the request assorted documents gathered by the OAG during its representation of the Texas Board of Nursing Facility Administrators in the license revocation proceedings. You contend that these documents are made confidential by various state statutes or are otherwise excepted from required public disclosure under various exceptions listed in subchapter C of chapter 552 of the Government Code.

Of the statutes that you have raised, we believe that section 242.127 of the Health and Safety Code (the "code") to be the most generally applicable to the records at issue. Subchapter E of chapter 242 of the code provides for procedures governing investigations conducted by the Department of Health or a "designated agency"¹ into reports of abuse and neglect in institutions such as nursing homes. Section 242.127 provides:

¹Section 242.121 of the code defines "designated agency" as "an agency designated by a court to be responsible for the protection of a resident who is the subject of a report of abuse or neglect."

A report, record, or working paper used or developed in an investigation made under this subchapter is confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Board of Health] or the designated agency.

Except for the report developed by the Texas Board of Licensure for Nursing Home Administration (the "licensure board report"), all of the records submitted to this office for which you claim section 242.127 confidentiality appear to fall squarely within that statute. Accordingly, we conclude that the OAG must withhold all such records pursuant to section 242.127.²

With regard to the licensure board report, we note that this record was submitted to this office in connection with a request for an open records decision by the board in 1992 and was the subject of an open records ruling issued by this office in the same year. *See* Open Records Letter No. 92-265 (1992). Records that are the subject of open records determinations are held by this office in a custodial capacity and as such never become official records of this office. *Cf.* Attorney General Opinion JM-446 (1986) (State Purchasing and General Services Commission acts as agent of Supreme Court in maintaining certain telephone records and thus those records belong to the court). Accordingly, because the licensure board report was never an official OAG record, it is not subject to the current open records request. If the requestor wishes to obtain a copy of this report, a separate open records request must be made to the Texas Board of Nursing Facility Administrators, which has replaced the Texas Board of Licensure for Nursing Home Administration and was created within the Texas Department of Health.

You have also submitted to this office for review a "Proposal For Decision" prepared by an administrative law judge during the course of the disciplinary proceedings against Barbara Doyle. You contend that portions of this record are confidential under section 12.003 of the Human Resource Code, section 5.08 of V.T.C.S. article 4495b, and the informer's privilege as incorporated into section 552.101 of the Government Code. We note, however, that this record is available to the public in its entirety from the State Office of Administrative Hearings. *See* Gov't Code § 2001.004(3) (all final orders,

²We note that included among the documents submitted to this office is an autopsy report. Although autopsy reports are usually deemed as public information under section 11 of article 49.25 of the Code of Criminal Procedure, this office believes that when used in an investigation of abuse or neglect conducted pursuant to chapter 242 an autopsy report in the hands of the investigating agency must be maintained as confidential. *Cf.* Open Records Decision No. 521 (1989) (autopsy reports contained in custodial death reports compiled pursuant to Code of Criminal Procedure article 49.18(b) not public information). *See also* Health & Safety Code § 242.134(d) (certain confidential reports made by institutions regarding resident deaths). *But see* Health & Safety Code § 242.134(e) (public statistical information regarding resident deaths at particular institution).

decisions, and opinions available for public inspection). The OAG therefore must release this record in its entirety.

You seek to withhold the telephone message from the Board of Nursing Facility Administrators to the assistant attorney general representing it in the revocation action pursuant to section 552.107(1), which protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. We agree that the telephone message constitutes a privileged communication for purposes of section 552.107(1) and thus may be withheld from the public.

You also seek to withhold portions of a legal memorandum from an OAG law clerk to an assistant attorney general pursuant to section 552.111 of the Government Code, which excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993) at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the inter-office memorandum dated May 6, 1992 that the OAG may withhold pursuant to section 552.111; the remainder of this memorandum must be released.

Finally, you contend that two draft documents come under the protection of section 552.111 of the Government Code. In Open Records Decision No. 559 (1990), this office held that a preliminary draft of a document that is intended for release in a final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to the predecessor of section 552.111. *See also* Open Records Decision No. 615 (1993) (information must be intended for use in the policymaking process). Assuming that the OAG will make available to the requestor the final published versions of these two

records, we conclude that you may withhold these draft documents at this time pursuant to section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/RWP/ch

Ref.: ID# 37222

Enclosures: Submitted documents

cc: Li Fellers
ABC News
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(w/o enclosures)